

THE HON'BLE SRI JUSTICE S.ANANDA REDDY

Second Appeal No.308 of 1997

JUDGMENT:

Plaintiff is the appellant. This second appeal is directed against the judgment and decree, dated 07.03.1996, passed by the learned Subordinate Judge, Srikalahasti in A.S.No.39 of 1991, under which, the judgment and decree, dated 23.08.1991, passed by the learned Principal District Munsif, Srikalahasti in O.S.No.308 of 1985 decreeing the suit was reversed and dismissed the suit.

During pendency of the second appeal, the plaintiff died and her legal heir was brought on record.

In the present second appeal, the following questions of law are raised stating to be the substantial questions of law arising out of the judgment and decree of the lower appellate Court.

- (a) Whether the respondent No.1 has got any legal right to occupy a portion of the public street and if not whether can a mandatory injunction not be given for the removal of such encroachments.
- (b) Whether respondent No.2 does not have a statutory obligation under the provisions of the A.P.Municipalities Act to remove the encroachments of a part of public street.
- (c) Whether the appellant does not have any legal right to enjoy every part of a public street and if so whether she is not entitled in law to obtain a decree for mandatory injunction against respondent No.1 for the removal of the bunk.

The plaintiff filed the suit for declaration of her

unobstructed right to the Municipal road marked as 'ABCD' in the plaint plan and for grant of mandatory injunction against the defendants to remove the encroachment (bunk) on the Municipal road marked as 'B', and on failure of the defendants to do so, to get the encroachment removed by the Court through the process of law and to grant permanent injunction from encroaching or allowing encroachment against the plaint plan and schedule mentioned Municipal road.

It is the case of the plaintiff that she is the owner and possessor of house bearing Door No.3/230 in Bazar Street, Srikalahasti, which is stated to be an ancestral house and which she got from her husband. It is further stated that the property is in possession and enjoyment of the joint family consisting of plaintiff and her sons, and she is the Manager of the family. The house is standing in the name of the plaintiff in the municipal records and taxes are being collected by the Municipality from her in respect of the said house. The plaintiff further states that there is a road from Bazar Street to reach her house shown as ABCD in the plaint plan and other houses are also there on the eastern side of the Municipal road. It is also stated that the plaintiff's house is on the eastern side of the Municipal road and the public have been using the Municipal road to reach their houses since time immemorial. It is further stated that Nippala Mandapam is there in front of the plaintiff's house, where during

Sivarathri festival, temple deities will be brought and the plaintiff's family used to give clothes and garlands to the deities, and pujas will be performed, after which, deities will be taken to Pushkarani. The plaintiff further states that there is no other road or passage to reach her house or the houses of others, which are situated on the eastern side of the Municipal road. It is stated that the second defendant-Municipality laid a metal road and constructed a drainage channel on the eastern side of the Municipal road during 1981-82 and later, the said metal road was replaced with cement road. It is the further case of the plaintiff that the first defendant encroached and occupied a part of Municipal road by constructing a bunk causing obstruction to the plaintiff and her men to use the municipal road and therefore, she made a complaint to the Municipality. On the complaint made by the plaintiff, the second defendant-Municipality removed the said bunk with the help of police on 16.02.1985. However, again the first defendant put up a bunk on the Municipal road marked as 'B' in the plaint plan. The residents of locality, including the plaintiff, made a complaint, dated 23.02.1985, to the Municipal Commissioner, Srikalahasti requesting him to get the bunk removed. But, the second defendant-Municipality failed to remove the same in spite of several petitions and telegrams reminding the complaint. However, on 14.06.1985, the Commissioner of Srikalahasti sent an endorsement informing the plaintiff

that the bunk was put up on the Government site and therefore, the plaintiff can seek redressal either in Court of law or from the Government. Hence, the present suit.

The first defendant filed his written statement disputing the ownership of the house in question bearing D.No.3/230 at Bazar Street, Srikalahasti and in fact, according to the first defendant, it is only a choultry and not belongs to the plaintiff. Further, the bunk put up by him does not cause any obstruction to the plaintiff or anybody to pass through the said passage or Municipal road. In fact, none of the locality people have complained, as still there is passage to the extent of 8 feet width and therefore, there cannot be no obstruction to use the Municipal road as alleged by the plaintiff. In fact, it is contended that the site on which the bunk was put up belongs to the Government and therefore, the Municipality or the plaintiff has no right to get the first defendant evicted. Hence, the first defendant sought dismissal of the suit.

The second defendant-Municipality also filed written statement denying the allegations made against it. However, it is admitted that house bearing D.No.3/230 situated in Bazar Street, Srikalahasti stands in the name of the plaintiff as per the records of the Municipality and also admitted that the Municipality has been collecting tax for the said house from the plaintiff. It is also admitted that there is a road from Bazar Street and the same is being

used by the residents of that place. But, it is disputed as to the correctness of the plaint sketch. The existence of Nippala Mandapam in front of the house of the plaintiff is also admitted. It is further admitted that the Municipality laid a road and constructed drainage channel on the eastern side of the road during 1981-82 and the bunk of the first defendant is not on the road but it is on the Western side of the road in the Government vacant site and it is in no way blocking the entrance of the road. It is stated that the plaintiff sent a petition on 04.04.1985, but on 23.02.1985, pursuant to which, the Municipality conducted due enquiry and the Town Surveyor has inspected and submitted his remarks, basing on which, the Commissioner sent an endorsement to the plaintiff stating that the bunk is on the Government site and therefore, it is only the revenue officials who are competent to take appropriate action. Hence, the second defendant sought dismissal of the suit against it.

Basing on the above pleadings, the trial Court framed appropriate issues and recorded evidence. On behalf of the plaintiff, her son holding GPA was examined as PW.1 and the Advocate Commissioner was examined as PW.2, apart from marking Exs.A1 to A6, and Exs.C1 to C2, Advocate Commissioner's report and sketch. On the other hand, on behalf of the defendants, the first defendant himself was examined as DW.1 and got examined another witness as DW.2, apart from marking

Exs.B1 to B3.

The trial Court observed that as per the Advocate Commissioner's report, a road leading from the main road was passing from North to South having length of 69 feet and width of 13 feet, which is being used not only by the plaintiff but also by other residents of the locality. As per the said report, the first defendant has put up his bunk on one side of the road to the extent of 16 feet South to West and 5½ feet East to West. The trial Court, after considering the evidence, gave a categorical finding that the entire street leading from the main bazaar street, which is towards North-West, is a Municipal road, where the first defendant has put up his bunk by encroaching upon the Municipal road and further, the plaintiff has got a right to use each inch of the public road for her ingress and egress. Therefore, the trial Court after referring to various judgments relied upon by the plaintiff, decreed the suit.

The said judgment and decree of the trial Court was assailed before the lower appellate Court. The learned Subordinate Judge, Srikalahasti without giving or recording any categorical findings and without even referring to the report of the Advocate Commissioner proceeded that the bunk is on the Government site and therefore, it is only the Government which has got the authority to take proceedings for eviction. It is further observed that the Municipality collected property tax from

the first defendant and no independent witness was examined by the plaintiff and accordingly, the lower appellate Court reversed the said finding of the trial Court and dismissed the suit. Aggrieved by the same, the present second appeal is preferred.

The learned counsel for the appellant-plaintiff, basing on the substantial questions of law as extracted above, contended that the lower appellate Court failed to appreciate and record categorical finding with reference to the report of the Advocate Commissioner, who is an independent authority appointed by the Court for inspection as well as for filing a report. It is also contended by the learned counsel that when the report of the Advocate Commissioner shows that the entire lane, which is running from North to South extending to 69 feet with a width of 13 feet, is being shown as a public street, the lower appellate Court without controverting the said finding, recorded a finding that the bunk is on the Government site and therefore, the Municipality has no right to evict the first defendant, for which, there is absolutely no evidence to support or substantiate the said conclusion. In fact, the first defendant though contended that the bunk is on the Government site, no evidence was brought on record. Even the receipts produced by the first defendant shows that the Municipality collected fee either as encroachment fee or otherwise, from the first defendant, and if the first defendant is in encroachment of

Government land, the Municipality has no right to collect any tax from the first defendant. Therefore, the learned counsel sought for setting aside the impugned order.

The learned counsel for the first respondent-first defendant, on the other hand, sought to sustain the judgment and decree of the lower appellate Court.

Heard both sides and considered the material on record.

After going through the material on record and the judgment of the lower appellate Court, this Court is of the opinion that the lower appellate Court has failed to consider the evidence on record properly, especially the report of the Advocate Commissioner.

Therefore, without recording any finding, the judgment and decree of the lower appellate Court is set aside and the matter is remitted to the lower appellate Court for fresh consideration and disposal. The lower appellate Court is directed to consider the report of the Advocate Commissioner and record its finding with reference to the alleged encroachment of the first defendant and dispose of the appeal expeditiously, preferably within a period of three months from the date of receipt of a copy of this order.

The second appeal is accordingly allowed. No costs.

07.03.2007

VGB